DON’T BE A VICTIM OF THE STARK LAW: UNDERSTAND HOW TO AUDIT PHYSICIAN CONTRACTS

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The Methodist Hospital System

- **About Methodist**
  - A leading Academic Medical Center located in the Texas Medical Center.

- **Size of Methodist Operations**
  - 5 Hospitals
  - $2.4B Net Revenue
  - 13,867 employees

- **Methodist Physicians**
  - 330 Employed physicians
  - Approx. 2000 Affiliated physicians
Objectives

- Brief Summary of the Physician Self-Referral
  - Understand the Stark Law
  - Types of financial relationships
  - Stark exceptions

- Audit Planning and Fieldwork
  - Physician Gifts (Incidentals and Non-Monetary Compensation)
  - Personal Services Arrangements (PSA)
  - Rental of Office Space and/or Equipment
  - Bona Fide Employment

- Audit Recommendations
Understand the Stark Law

If a physician (or immediate family member) has a Financial Relationship with an Entity, and patients are being referred for certain Designated Health Services (DHS) payable by Medicare, then the activity must comply with an exception.

And

The Entity is prohibited from filing claims with Medicare (or billing another individual, entity, or other third-party payer) for those DHS rendered as a result of a prohibited referral.
Understand the Stark Law

- Common DHS providers include PT/OT Services, Radiation Therapy, Radiology or other DX Services, Hospital IP/OP Services.
- Lack of bad intent is irrelevant for overpayments.
- Penalties:
  - Must repay government for all billing associated with prohibited referrals /arrangements.
  - Civil Monetary Penalties (CMP) and program exclusion for knowing violations.
    - $15,000 CMP for each service.
    - Civil assessment up to 3 times the amount claimed.
    - Civil monetary penalties up to $100,000 for arrangements designed to circumvent the Stark Law.
- False Claims Act Liability
Types of Financial Relationships

Common Financial Relationships:
- Physician employment agreements
- ED Call and/or Committee Compensation
- Medical Directorship
- Speaking Engagement – CME, Honorarium
- Physician office space leases or equipment leases
- Professional discounts for hospital services
- Physician recruitment agreements
- Parking/Gifts/Dinner
Stark Exceptions

Examples of Common Stark Exceptions:
- Personally performed services
- Professional courtesy
- Bona fide employment
- Medical staff incidental benefits
- OB/GYN malpractice subsidies
- Rental of equipment / office space
- Compliance training (CME)
- Non-monetary compensation (gifts)
- Personal services arrangements (PSA)
- Preventative screening tests, immunizations and vaccines
Proceed Cautiously Through Uncharted Waters

Audit Planning

- Seek legal counsel and determine the cost/benefits of attorney/client privilege.
- Does you need external assistance?
- Determine your plan of attack.
  - Will you audit for compliance with the Stark exceptions most likely to occur at your facility?
  - Will you audit employed physicians only?
  - Will you audit accounts payable data only?
The Affordable Care Act established a voluntary CMS Self-Referral Disclosure Protocol (SRDP) for actual or potential Stark violations.

The Secretary of HHS has the authority to reduce the amount due for all violations of the physician self-referral statute.

The Secretary may take into consideration the following for determination of an overpayment reduction:
- the nature and extent of the improper or illegal practice;
- the timeliness; and
- the cooperation in providing additional information related to the disclosure.
## Wall of Shame

### CMS Self-Referral Disclosure Protocol Settlements


<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Settlement Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-10-11</td>
<td>Entity violated the Stark PSA exception for arrangements with certain hospital department chiefs and the medical staff for leadership services and for arrangements with certain physician groups for on-site overnight coverage.</td>
<td>$579,000</td>
</tr>
<tr>
<td>6-18-12</td>
<td>Arrangements with a physician and a physician group practice had lapsed and may have violated the Stark Law because those arrangements did not satisfy the requirements of the PSA exception.</td>
<td>$59,000</td>
</tr>
<tr>
<td>1-5-12</td>
<td>Entity violated the Stark Law by exceeding the calendar year non-monetary compensation limit for two physicians.</td>
<td>$4,500</td>
</tr>
</tbody>
</table>
Potential Data Sources

- AP file
- Lease AR file
- MOB occupancy listing
- Contract Management System
- HR’s W-2 payments
- Marketing and/or Foundation’s fundraiser/charity event attendance log
AP Data Suggestions

- Consider using audit analytic tool such as ACL or Idea.
- Identify physician type - payment analysis will be different based on the physician’s relationship with the hospital.
- If your AP data does not identify vendor types, consider relating AP file to HR Employee File and/or Medical Staff Listing.
- Validate the physician has the ability to refer Medicare patients to your hospital, i.e. PhDs vs MDs.
- Understand the payment purpose then classify the payments based on type. Try to classify types using Stark exceptions.
- Sum and count physician payments. Select sample accordingly.
Roll your sleeves up, it may get dirty!

- Determine whether physician financial relationships comply with the terms of a Stark Exception.
- Now it’s time to audit
  - Physician Gifts – Is it a Medical Staff Incidental Benefits or Non-monetary Compensation?
  - Personal Services Arrangements (PSA)
  - Rental of Office Space and/or Equipment
  - Bona Fide Employment
Audit Objective: Determine whether physician gifts and meals comply with Medical Staff Incidental Benefits or Non-Monetary Compensation Exception.

- Medical Staff Incidental Benefits Exception § 411.357(m)(5)
  - Entity may give a Physician a benefit valued at less than $31 (adjusted annually based on inflation) per occurrence. The benefit must be an item or service other than cash or cash equivalents and be:
    - Provided to all members of the medical staff without regard to the volume or value of referrals;
    - Provided and used only when the Physician is making rounds or is engaged in other services or activities on the hospital campus that benefit the hospital or its patients; and
    - Reasonably related to the provision of, or designed to facilitate the delivery of medical services at the Entity.
 Auditing Physician Gifts

Non-Monetary Compensation Exception § 411.357(k)

- Entity may give a Physician a benefit valued less than $373 (adjusted annually based on inflation) or the total value of all such compensation extended to the Physician is less than $373 for the calendar year per Entity hospital location;
- It is not cash or a cash equivalent;
- It does not take into account the actual or potential volume or value of referrals or other business generated by the referring Physician; and
- It is not solicited by the Physician.
Auditing Physician Gifts - Examples

- Limousine service
- Hospital logo gifts
- Sporting event tickets
- Doctor’s Day Gala, with the exception of one staff-appreciation event per year
- Charity golf tournaments (fee waiver for MDs)
- Flowers/ Food baskets
- iPads
- Smart phones
- Paid meals (excluding incidentals)
- Other hospital marketing and fundraising events
- Framed art
Audit Fieldwork – Physician Gifts

- Determine how your Entity tracks physician gifts. If applicable, obtain the Non-Monetary Compensation Tracking Log.
- Talk to your Foundation and Marketing departments and physician liaisons. Understand how and where physician gifts occur.
- Collect accounts payable data and filter by general ledger account description (potential gift payments).
- Select payment reimbursements from Clinical Department Directors, Hospital Executives, and Department Chairs.
Audit Fieldwork – Physician Gifts

- Obtain payment support for each gift in sample.
- Determine whether gifts fully comply with Incidental Benefits.
- If Non-Monetary Compensation exception, validate that it is tracked. Quantify amount per physician.
- Note: If physician payment is reimbursement for Compliance training or Honorarium, it is likely to be covered by the Compliance Training or PSA Exception.
Audit Recommendations

If audit fieldwork reveals your entity inadvertently exceeded the current compensation year’s limit, you can recommend the below as CMS provides a remedy §411.357(k):

- Cannot exceed the limit more than 50% during calendar year
- Recipient repays excess compensation within calendar year or 180 days of excess compensation receipt.
- If above conditions are satisfied then compensation deemed within the limit.
- Note: Can only use once/year for individual physician.
Audit Recommendations

- Create a Physician Gift Policy.
- Create a Non-monetary Tracking Log with centralized access.
- Conduct periodic training for applicable parties.
Are You Sweating Yet?

Many exceptions share some common elements, especially those involving physician contracts and compensation.
Auditing Personal Services Arrangements

Audit Objective: Determine whether physician compensation is supported by a valid contract as defined by the Personal Services Arrangements (PSA) Exception.

- PSA Exception 42 U.S.C. §1395nn (e)(3)
  - Agreement is in writing and specifies the services covered.
  - Signed by all parties.
  - Term must be minimum of one year.
  - Compensation must be fair market value and set in advance.
  - Aggregated services should not exceed reasonable and necessary for legitimate business purposes.
  - Compensation can not be based on the value or volume of referrals (except for the physician incentive plan).
  - A holdover period for expired contracts is allowed for 6 months.
Audit Fieldwork – PSA

- Collect Accounts Payable data. Filter by GL account description and MD vendor type.

- Distinguish between employed physicians, non-employed physicians, and physician owners. Other physician types should be covered by different Stark exceptions, i.e. bona fide employment.

- Choose sample of non-employed physicians to test.

- Obtain payment support for each payment in sample, including all timesheets.

- Obtain physician contracts and FMV analysis.
  - If physician agreements are not stored centrally, identify responsible parties of physician payments.
  - Possible locations: Med Staff Office, Legal Services, Operational Departments.
Audit Fieldwork – PSA

- Create a checklist of items each agreement should contain.
- Trace physician payments to an agreement. Validate payment complies with agreement.
- Validate each agreement complies with terms of Stark exception.
- Compare all physician payment sources for reasonableness: ED Call, Committee Pay, Directorship.
Audit Objective: Determine whether physician compensation is supported by a valid contract as defined by the Office Space and Equipment Rentals Exception.

- Office Space and Equipment Rentals Exception 42 U.S.C. § 1395nn(e)(1)(A and B)
  - The lease is in writing, signed by the parties, and specifies the premises/equipment covered by the lease.
  - The space rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental and is used exclusively by the lessee.
  - Lease term must be minimum of one year.
  - Lease must be FMV, set in advance and not based on the value or volume of referrals.
  - A holdover period for expired contracts is allowed for 6 months.
Audit Fieldwork – Physician Rentals

- Obtain Lease Accounts Receivable data from the MOB.
- Obtain master occupancy listing.
- Match master occupancy listing to the AR data to identify any occupied space missing from receivables.
- Select a sample of vacant spaces and confirm they are vacant.
- Choose sample of rentals payments and sample of leased office spaces.
- Obtain lease agreement and FMV analysis.
- Create a checklist of items each lease agreement should contain.
- Trace payments and/or leased space to an agreement. Ensure payment complies with lease terms.
- Validate each agreement complies with terms of Stark exception.
Audit Objective: Determine whether physician compensation is supported by a valid contract as defined by the Bona Fide Employment Exception.

Bona Fide Employment 42 U.S.C. § 1395nn (e)(2)
- Physician must be an employee as defined by IRS code.
- Agreement is in writing and specifies the services covered.
- Compensation is consistent with the FMV of the services and not based on the value or volume of referrals.
- Agreement is commercially reasonable even if no referrals were made to the employer.
Audit Fieldwork – Bona Fide Employment

- Obtain HR W-2 payments file.
- Obtain physician employee listing.
- Choose sample of employed physicians to test.
- Obtain employee physician contracts.
- Obtain physician productivity calculation, if applicable, to support compensation.
- Create a checklist of items each contract should contain.
- Trace physician payments to an agreement. Validate payment complies with agreement.
- Validate each agreement complies with terms of Stark exception.
- Recalculate productivity payments and validate source inputs.
Audit Recommendations

- Consider using outside FMV consultant for complicated arrangements.
- Conduct periodic training to applicable parties.
- Require Legal review of all physician contracts.
- Create a Physician Contract Compliance Policy.
- Centralize physician contract repository or use a contract management system.
- Require approval on MD timesheets for reasonableness.
- Conduct periodic follow-up audits.
- Revise Accounts Payable Reimbursement Form
  - Require Stark exception support for payment, i.e. tracking log with date and time stamp
  - Consider an additional level of approval by Stark-educated management.
Audit Results

Who you gonna call? Ghostbusters!

If you believe you have a potential Stark violation, please contact your Legal Department.
References

An Auditor’s Disclaimer

An all encompassing Stark audit checklist is equivalent to creating a one page summary of the Affordable Care Act. The likelihood of that...
When in Doubt, Don’t Freak Out

The laws and regulations in this area are extremely complex and you should always consult with experienced legal counsel on any questions you may have related to your particular situation.
Questions and Answers
Save the Date:

32nd Annual Conference
Chicago, IL

ahia
Assoc. of Healthcare Internal Auditors